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2023

State Legislative Resistance

Written by: *Christian G. Fritz*

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My latest book, *Monitoring American Federalism: The History of State Legislative Resistance* demonstrates how states played a crucial role from the beginning of the republic in assessing the equilibrium of federalism within the American constitutional order. Although states and state legislatures were actively engaged in the debate over federalism, there has been a long-standing focus on the United States Supreme Court as the body charged with settling the shifting national

perceptions about the meaning of the Constitution and the balance of the federalism that it created.

However, as the reaction to the *Dobbs v. Jackson Women's Health Organization* decision overturning *Roe v. Wade* demonstrates, state constitutions can provide—through amendment or state judicial interpretation—constitutional rights no longer available under the Supreme Court's interpretation of the Federal Constitution. While state protections obviously lack national scope, those efforts underscore a truth often overlooked about American federalism: that state constitutions provide a source and basis for individual rights and liberties independent of the Federal Constitution. Thus, resurgence of interest in the theory of independent state constitutional grounds reminds us of the complexity and dynamism inherent in America's federal system.

An exclusive focus on the Supreme Court's role neglects a lost dimension of American constitutional history—the critical role played from 1787 through the aftermath of the Civil War of diverse, state-based articulations of federalism. My book explores how state legislatures assumed a distinct interpretative role even as federal courts developed their judicial authority. In *The Federalist*, both Hamilton and Madison described such a role for state legislatures and defended the proposed Constitution in part because states would be able to “sound the alarm” to identify potential overreaching by the national government through interposition. Unlike judicial review, interposition did not have immediate constitutional effect, but was designed to work through political pressure in attempting to maintain an equilibrium between the national and state governments by enabling state legislatures to express and coordinate their discontent over federal laws and measures.

In its use before the Civil War, interposition by states involved the conviction that elected officials, especially state legislators, but also individual citizens, juries, or the press, could properly scrutinize any expansive assertions by the federal government, not simply the Supreme Court. State interposition would be used to oppose many perceived threats, including the Alien and Sedition Acts, the War of 1812, federal tariffs, internal improvements, and pro-slavery laws.

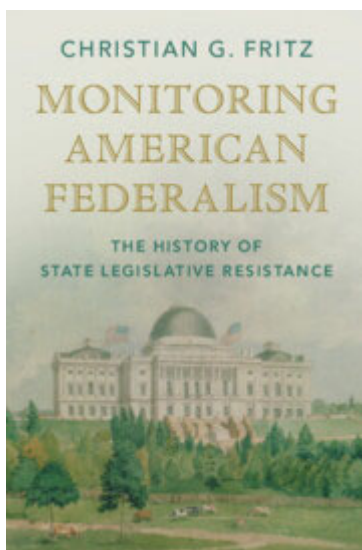
Interposition emerged as a response by critics worried that the Constitution's grant of national powers would obliterate state authority. This early interposition formed an institutional way to acknowledge the divided sovereignty between the national and state governments and to preserve the equilibrium of federalism. Properly understood at the time, interposition was **not** a claim that state sovereignty could or should displace national authority, but a claim that American federalism needed to preserve some balance between state and national authority.

Interposition as a constitutional tool became distorted with the rise of South Carolinian John C. Calhoun's claims during the Nullification crisis of the 1830s. Historians today describe interposition as inherent in the states' rights political tradition of defending slavery, which inexorably led to Southern secession and Civil War. This narrative ignores the practice of interposition before its appropriation by nullifiers and those invested in slavery who claimed the right of individual states to defy national laws and decisions of the Supreme Court. Nonetheless, there was a great divide between those who advocated for the rights of state legislatures to question the federal government on any constitutional issue through interposition—and those who supported nullification. The gulf between the two invocations of state interposition was underscored in the 1830s, when many of those who embraced interposition rejected nullification.

The decline of interposition after the Civil War can be traced to the growth of powers that the federal government assumed during the war. Inevitably, the Civil War Amendments placed additional power in the hands of the national government. Thus, as the enhancement of national authority altered the balance of federalism, states were with left their reserved rights, now subject to the constraints imposed on them by the new powers granted to the national government. Concerned that the balance

of federalism had shifted dramatically, it is no wonder that the slogan of states' rights was embraced after the war by those who resisted Reconstruction and the efforts to implement the Civil War Amendments.

By the 1870s, enhanced federal authority and the growing assumption that the Supreme Court was the natural arbiter of the constitutional relationship between the federal and state governments largely eclipsed the basic function of interposition to protest perceived imbalance in the equilibrium of federalism. What remains is whether interposition as a sounding the alarm function of the states serves any useful purpose today.



Monitoring American Federalism by Christian G. Fritz

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